

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Exclusive Service Contracts for Provision)	MB Docket No. 07-51
Of Video Services in Multiple Dwelling)	
Units and Other Real Estate Developments)	

**REPLY COMMENTS OF
WORLDNET TELECOMMUNICATIONS, INC.**

WorldNet Telecommunications, Inc. ("WorldNet"), by and through its undersigned counsel, respectfully submits the following reply comments in response to the Federal Communications Commission's (the "Commission") March 27, 2007, Notice of Proposed Rulemaking("NPRM") seeking comments on the use of exclusive contracts for the provision of video services to multiple dwelling units or other real estate developments.¹

I. OVERVIEW

In its initial comments, WorldNet stated that the FCC must not act precipitously in eliminating the availability of arrangements that are exclusive or have the effect of being exclusive and similar arrangements between providers of competitive multi-channel video services and building owners and developers of multiple dwelling units ("MDUs") and residential homes.² WorldNet stated that these arrangements advance the FCC's goals of promoting facilities-based competition and making new services available to consumers at lower prices. WorldNet explained that arrangements that are either exclusive or have the effect of

¹ *In the Matter of Exclusive Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MM Doc. No. 07-51, Notice of Proposed Rulemaking, FCC 07-32 (rel. Mar. 27, 2007) ("NPRM"); as amended by Extension of Time to File Comments on the use of Exclusive Contracts for the Provision of Video Services to Multiple Dwelling Units, MM Doc. No. 07-5, Public Notice, DA 07-2584 (rel. June 13, 2007)) (extending filing deadlines).

² Comments of WorldNet Telecommunications, Inc. at 1.

being exclusive provide the necessary level of certainty that competitive multichannel video service providers will earn a reasonable return on their facilities investments, and thus encourage deployment of facilities and new and innovative services to particular communities. WorldNet submitted that, in light of the pro-competitive and public benefits that derive from these arrangements, the FCC must not bar competitive providers from entering into such arrangements with MDUs or new residential developments.³

As more fully discussed below, the majority of the comments filed in this proceeding support WorldNet's position. Accordingly, the FCC should seriously consider WorldNet's position and reject any request by self-interested parties to regulate or make unlawful agreements that are exclusive or have the effect of being exclusive. .

II. THE RECORD SHOWS THAT ARRANGEMENTS THAT ARE EXCLUSIVE OR HAVE THE EFFECT OF BEING EXCLUSIVE PROMOTE THE COMMISSION'S PRO-COMPETITIVE POLICY OBJECTIVES

Preliminarily, WorldNet agrees with several parties who argue that the NPRM is virtually open-ended, lacking in specificity, and somewhat confused.⁴ Indeed, the Commission has not proposed any rules or advanced concrete, substantive proposals to address the problems it perceives to exist. Moreover, there appears to be significant ambiguities in the NPRM. For example, as one party points out, it is not entirely clear from the NPRM whether the Commission seeks to prohibit *all* kinds of exclusive arrangements.⁵ WorldNet agrees with Real Access Alliance that exclusive marketing and exclusive access to inside wiring arrangements do not preclude access and service by competing providers and there is thus no reason to regulate them. On the other hand, exclusive access agreements, *i.e.*, exclusive arrangement to serve or install

³ *Id.* at 1-2.

⁴ *See, e.g.*, Comments of Real Access Alliance at 7.

⁵ Comment of Real Access Alliance at 7 (stating that there are different types of exclusive agreements, *i.e.*, contracts giving exclusive marketing rights, contracts giving exclusive access to wiring, and contracts giving exclusive access to buildings).

facilities in a building or other developments, promote facilities deployment and thus should be encouraged rather than discouraged. Moreover, the NPRM fails to define what is meant by “other real estate developments.”⁶ As several parties observe, the factual circumstances in large greenfield and other residential developments differ fundamentally from those that are present in existing MDU environments.⁷

These ambiguities aside, the comments in this proceeding support WorldNet’s position that arrangements that are exclusive or have the effect of being exclusive between property owners and competitive service providers promote the achievement of the federal goals of enhanced multichannel video competition and accelerated broadband competition.⁸ For example, the record shows that competitive providers have made substantial investments to deploy new facilities or rebuild existing facilities in order to provide broadband access, high definition television, and other desirable services to MDUs.⁹ Without reliable exclusive access agreements, these competitive providers would not have made these substantial investments since they would not have been assured of a reasonable return on investment. Shenandoah Telecommunications Company (“Shentel”), for example, has been able to construct network facilities and deploy video and other services—often in non-urban and underserved areas—precisely because exclusive agreements offer it an opportunity for a return on the significant capital expenditures necessary to construct such networks. Because some of these areas are not served by incumbent service providers, residents of those properties would have been left with

⁶ See, e.g., Comments of OpenBand Multimedia, L.L.C. at 9. (distinguishing among several types of exclusive arrangements).

⁷ See, e.g., Comments of Lennar Corporation at 10 (stating that new residential developments in previously undeveloped areas are readily distinguishable from MDUs that have been subject to access regulation by the FCC).

⁸ Comments of WorldNet Telecommunications, Inc. at 3; Comments of the Independent Multifamily Communications Council at 7.

⁹ See, e.g., Comments of Charter Communications, Inc. at 1-2; Comments of Greenfield Service Provider Coalition at 6-7.

few service options and no meaningful broadband service if Shentel had not been granted exclusive arrangements.¹⁰

III. THE RECORD DEMONSTRATES THAT CONSUMERS BENEFIT FROM EXCLUSIVE ARRANGEMENTS

In its comments, WorldNet explained that the benefits of arrangements that are exclusive or have the effect of being exclusive ultimately inure to the benefit of residential customers.

The record in this proceeding supports WorldNet's position. Indeed, commenters agree that exclusive agreements result in enhanced service offerings and competitive prices for consumers¹¹. Moreover, as WorldNet asserts, arrangements that are exclusive or have the effect of being exclusive provide additional tangible benefits to residents, such as quality of service commitments.¹² One of the most important benefits for residents is the quality of service commitments owners and developers typically require in exclusive agreements, which give them significant leverage to enforce a consistently high level of customer service and programming from the providers. At bottom, residential customers benefit from such arrangements.

IV. THE RECORD SHOWS THAT THE COMMISSION HAS NO AUTHORITY TO BAN ARRANGEMENTS THAT ARE EXCLUSIVE OR HAVE THE EFFECT OF BEING EXCLUSIVE

WorldNet agrees with numerous commenters who assert that the Commission has no authority to regulate the use of exclusive agreements.¹³ Contrary to the assertion of a few commenters,¹⁴ the record clearly shows that none of the statutes cited by the Commission in the NPRM gives it authority over exclusive agreements. In the NPRM, the Commission points to sections 623 and 628 of the Communications Act, and section 706 of the Telecommunications

¹⁰ Comments of Shenandoah Telecommunications Company at 3.

¹¹ Comments of Shenandoah Telecommunications Company at 2.

¹² Comments of WorldNet Telecommunications, Inc. at 5. *See also* Comments of Real Access Alliance at 17.

¹³ *See, e.g.*, Comments of the New Jersey Division of Rate Counsel at 6; Comments of Time Warner Cable at 8; Comments of National Cable & Telecommunications Association at 4.

¹⁴ *See, e.g.*, Comments of Corning Incorporated at 9; Comments of Verizon on Exclusive Access Contracts at 15-19; Comments of SureWest Communications at 13; Comments of AT&T, Inc. at 15.

Act of 1996, for its statutory authority over exclusive arrangements. Plain and simple, section 628 of the Communications Act does not apply to contracts dealing with exclusive access to buildings. As several commenters point out, section 628(b) never refers to access to buildings or physical property; rather, the prohibition in section 628(b) relates to contracts for the acquisition of video programming by competitive programming providers.¹⁵

Section 623 of the Communications Act similarly does not authorize the Commission to regulate exclusive building arrangements. Commenters agree that the statute only directs the Commission to adopt a rate regulation scheme to benefit cable television subscribers, but it does not direct the Commission to regulate any aspect of any agreements between property owners and video service providers.¹⁶

Finally, section 706 of the Telecommunications Act of 1996 does not give the Commission any authority over exclusive agreements. While section 706 does contemplate inquiries by the Commission in to the deployment of advanced telecommunications capability, it is not an independent grant of authority.¹⁷ Accordingly, nothing in the statutes upon which the Commission purports to base its authority in fact gives the Commission the authority to regulate exclusive access arrangements.

**V. THE RECORD DEMONSTRATES THAT BANNING AGREEMENTS
THAT ARE EXCLUSIVE OR HAVE THE EFFECT OF BEING EXCLUSIVE
WILL DO MORE HARM THAN GOOD**

The NPRM proceeds from the assumption that the banning arrangements that are exclusive or have the effect of being exclusive will have positive effects on competition and

¹⁵ Comments of National Cable & Telecommunications Association at 4; Comments of Real Access Alliance at 30.

¹⁶ Comments of Real Access Alliance at 36. *See also* Comments of National Cable & Telecommunications Association at 6-7.

¹⁷ *See* Comments of Real Access Alliance at 39. *See also* Comments of National Cable & Telecommunications Association at 7-8.

consumers. As the record demonstrates, this is not the case. First, the record shows that certain forms of exclusive agreements do not, in fact, prohibit or block entry by competitors. Second, there can be no assurances that banning exclusive agreements will have a downward effect on the prices paid by residential customers. Third, it is estimated that no more than half of apartment buildings are subject to any kind of exclusivity provision, and even a smaller proportion are subject to exclusive access agreements—thus leaving a significant portion of the market wide open to entry by competitors.¹⁸ Finally, there is scant evidence that exclusive agreements are serving as barriers to entry or are significantly impeding the deployment of video services by other providers.¹⁹

On the other hand, banning arrangements that are exclusive or have the effect of being exclusive will have deleterious and immediate impact on building and residential development owners, residential customers, and competitive providers.²⁰ As explained above, residential subscribers benefit significantly from competitive rates, state-of-the-art technology, and high-quality services that derive from exclusive arrangements. In turn, competitive providers are encouraged to deploy facilities and provide services to otherwise unserved or underserved areas precisely because exclusive arrangements give them some assurances that they will be able to ultimately recoup their investments. Indeed, as some commenters demonstrate, exclusive agreements have the effect of furthering competition in certain areas.²¹ For example, OpenBand Multimedia reports that in Loudoun County, Virginia, where it has deployed facilities, providers not offering advanced broadband services were forced to develop new strategies to compete with

¹⁸ *Id.* at 16 (estimating that only a small proportion of more than 500,000 apartment buildings in the United States are subject to exclusive agreements).

¹⁹ *See, e.g.*, Comments of National Cable & Telecommunications Association at 12; Comments of OpenBand Multimedia, L.L.C. at 5.

²⁰ *Id.* *See also* Comments of Lifestream Holdings, LLC at 5.

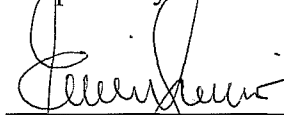
²¹ *See, e.g.*, Comments of the Greenfield Service Provider Coalition at 19.

it from both a price and performance perspective—thus encouraging other video and telecommunications service providers to accelerate their own network upgrade plans.²² An outright ban on agreements that are exclusive or have the effect of being exclusive will most assuredly eliminate these benefits, with very little, if any, collateral positive impact on consumers and competition.²³ Indeed, prohibiting the use of exclusive agreements for MVPD services may actually be harmful to competition.²⁴

VI. CONCLUSION

The comments filed in this proceeding support WorldNet's position that arrangements that are exclusive or have the effect of being exclusive related to the provision of video services in MDU and other real estate developments advance the FCC's goals of promoting facilities-based competition and making new and advanced services available to consumers at lower prices. Accordingly, the Commission should not adopt any rules that would prohibit or have the effect of prohibiting competitive providers from entering into these arrangements.

Respectfully submitted,



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²² See Comments of OpenBand Multimedia, L.L.C. at 5.

²³ See, e.g., Comments of OpenBand Multimedia, L.L.C. at 1.

²⁴ See, e.g., Comments of Lennar Corporation at 7 (“if exclusive contracts are made unavailable as a means of attracting investment to new developments, these new developments could become stranded islands of underdevelopment of multichannel video, broadband and other advanced communications”).